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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNION COMMERCE BANK,

Petitioner,

v.

DEFFET RENTALS, INC.,
GEORGE DEFFET AND ROSE DEFFET,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ohio courts violated federal bankruptcy law by permitting former debtors in bankruptcy proceedings to assert in their own right causes of action that were neither scheduled, abandoned, nor administered in those proceedings.

2. Whether the Ohio courts violated federal bankruptcy law by permitting former debtors in bankruptcy proceedings to assert, on their own behalf, causes of action not fully and completely disclosed to their creditors in the bankruptcy proceedings.

3. Whether the Ohio courts violated the Full Faith and Credit Clause of the United States Constitution by failing to give collateral estoppel effect to a judgment rendered by a Tennessee state court.*

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*Since the commencement of this litigation, petitioner Union Commerce Bank has converted from a state bank to a national banking association pursuant to 12 U.S.C. § 35, and is now known as The Huntington National Bank of Northeast Ohio and has two wholly owned subsidiaries. The Huntington National Bank of Northeast Ohio is a wholly owned subsidiary of Huntington Bancshares Incorporated, a publicly held Maryland corporation with the following wholly owned subsidiaries: Scioto Life Insurance Company; CUbank Corp., The Huntington State Bank being a wholly owned subsidiary thereof; and The Huntington National Bank, with the following subsidiaries: The Huntington National Bank of Port Clinton; The Huntington National Bank of Nelsonville; The Huntington Leasing Company; The Huntington Mortgage Company; and The Huntington Investment Company. All of the foregoing corporations are wholly owned with the exception of The Huntington National Bank of Port Clinton in which directors own directors' qualifying shares.

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Union Commerce Bank (the "Bank") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Appellate District of Ohio and the Supreme Court of Ohio's dismissal of the appeal therefrom entered on April 4, 1984.

OPINIONS BELOW

The Judgment of the Court of Common Pleas for Cuyahoga County, Ohio is unpublished and is included in the Appendix hereto. The Judgment and Opinion of the Court of Appeals for the Eighth Appellate District of Ohio is unpublished and is included in the Appendix hereto. The Judgment of the Ohio Supreme Court is unpublished and is included in the Appendix hereto.

JURISDICTION

The Judgment of the Ohio Supreme Court dismissing petitioner's appeal from the Court of Appeals for the Eighth Appellate District of Ohio was entered on April 4, 1984. This Petition for Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article IV, Section 1, United States Constitution:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.

2. Amendment XIV, Section 1, United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

3. The text of Sections 350; 521; 541(a); and 554 of the Bankruptcy Code, 11 U.S.C. §§ 350, 521, 541(a) and 554, are set forth as Appendices E, F, G and H to this Petition. The text of Sections 7(a)(8); 21(h); 70(a); and 70(i) of the Bankruptcy Act, Ch. 575, §§ 7(a)(8); 21(h), 70(a) and 70(i), 52 Stat. 840, 847, 853, 879 and 882 (repealed 1978) are set forth as Appendices I, J, K and L to this Petition. The text of the Act of November 6, 1978, Pub. L. No. 95-598, § 403, 92 Stat. 2549, 2683 (1978), is set forth as Appendix M to this Petition. The text of Section 2305.21 of the Ohio Revised Code, OHIO REV. CODE ANN. § 2305.21, is set forth as Appendix N to this Petition. The text of Bankruptcy Rule 6007 is set forth as Appendix O to this Petition. The text of former Bankruptcy Rules 515; 11-38(f); and 11-55 are set forth as Appendices P, Q and R to this Petition.

STATEMENT OF THE CASE

A. Preliminary Statement

Deffet Rentals, Inc., George Deffet, and Rose Deffet (hereinafter "Deffets") were debtors and debtors in possession in bankruptcy proceedings under Chapter XI of the United States Bankruptcy Act (the "Bankruptcy Act"), that were commenced on or about April 22, 1975. At that time, all but one of the causes of action alleged by Deffets in the instant case had accrued. Deffets' alleged third cause of action accrued prior to the confirmation of Deffets' plan of arrangement. Notwithstanding the existence of these claims, which are allegedly worth about Eighty-Three Million Dollars ($83,000,000.00), Deffets failed to list the claims in their schedules of assets, as required by law. Instead, after the confirmation of their plan of arrangement, but before the entry of a final decree terminating their proceedings, Deffets instituted the instant case against the Bank on their own behalf rather than on behalf of their creditors.

Decisions of this Court and other federal courts establish that Deffets lack standing to assert the causes of action alleged herein on their own behalf because their claims were not scheduled nor administered in Deffets' Chapter XI proceedings. Because of Deffets' lack of standing, and because a judgment of a Tennessee state court collaterally estops Deffets from asserting their third cause of action herein, the trial court entered summary judgment dismissing Deffets' complaint. The Ohio Court of Appeals, however, ignored the decisions of this Court and other federal courts, as well as the Full Faith and Credit Clause of the United States Constitution, and reversed the entry of summary judgment. The Ohio Supreme Court refused to correct these errors and dismissed the Bank's appeal.

Since the Ohio Supreme Court and the Court of Appeals for the Eighth Appellate District of Ohio (hereinafter referred to collectively as the "Ohio courts") have violated fundamental principles of federal bankruptcy law as interpreted by this Court, and the United States Constitution, the Bank prays that its Petition for Certiorari be granted. Indeed, the Ohio courts' obvious disregard for decisions of this Court and other federal courts interpreting a federal law warrants summary reversal of the decision below pursuant to S. Ct. R. 23.1.

B. Procedural History

During the pendency of their Chapter XI proceedings, Deffets filed this action in the Court of Common Pleas for Cuyahoga County, Ohio, seeking to recover damages from the Bank for alleged breach of contract, fraud, interference with property and unjust enrichment. By motion under Rule 56 of the Ohio Rules of Civil Procedure, the Bank requested summary judgment as to all counts in Deffets' Complaint on the ground that Deffets lack standing to bring the action and as to the third cause of action on the further ground that the doctrine of collateral estoppel bars Deffets from asserting that claim. The trial court entered summary judgment in favor of the Bank on November 9, 1981. (Appendix D to Petition for Certiorari (hereinafter cited as "App. ")))

Deffets appealed from this judgment to the Court of Appeals for the Eighth Appellate District of Ohio (the "Court of Appeals"). Notwithstanding Deffets' failure to schedule these alleged causes of action, and the fact the claims were not administered in Deffets' Chapter XI proceedings, the Court of Appeals held that there was sufficient disclosure of the causes of action based on random "mentions" of the alleged claims during the bankruptcy proceedings. The Court of Appeals reversed the entry of summary judgment in a decision announced on July 28,

1983. (App. C) The Court of Appeals denied the Bank's motion for reconsideration on December 12, 1983, and journalized its judgment of reversal on that date. (App. B) The Bank timely sought review in the Ohio Supreme Court, but the Bank's appeal was dismissed in a decision entered April 4, 1984.[1] (App. A)

C. How Federal Question Is Presented

The Bank presented to the trial court the federal issues that are dispositive of this case: That Deffets have no right under federal bankruptcy law to assert rights individually in causes of action that were not scheduled or administered in their Chapter XI proceedings, and that Deffets' third cause of action is barred by the Full Faith and Credit Clause of the United States Constitution. The Bank continued to advance these federal issues in the Court of Appeals and the Ohio Supreme Court.

D. Statement of Facts

Respondent Deffet Rentals, Inc. is a real estate company in which respondents George and Rose Deffet are sole shareholders and were guarantors of loans. (App. C, at 6a; Complaint, ¶¶3 and 11) The Bank made a series of construc-

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[1]The present case meets the criteria for a final judgment for purposes of 28 U.S.C. § 1257 enunciated by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975) since (1) the federal issues raised by the Bank were decided with finality and no other federal issues exist although the Bank could ultimately prevail on the merits under state law; (2) a reversal of the decision on the federal issues herein would terminate this litigation; and (3) this Court's refusal to review the decision "might seriously erode federal policy" by permitting former debtors to assert their individual rights in unscheduled and unadministered property and permitting a state court to ignore the judgment of a court in a sister state.

tion loans to Deffet Rentals, Inc., and the Bank's alleged breach of those loan agreements is the basis for the claims Deffets now assert against the Bank. (App. C, at 6a) On April 22, 1975, proceedings under Chapter XI of the Bankruptcy Act were commenced by Deffet Companies, Inc., Deffet Rentals, Inc. and George and Rose Deffet in the United States District Court, Southern District of Ohio, Bankruptcy Division, Deffets' Chapter XI proceedings being Chapter XI Case Nos. B 2 75-1193 through B 2 75-1195, inclusive (hereinafter the "Chapter XI Proceedings"). Deffets served as debtors in possession in the Chapter XI Proceedings.

Deffets failed to list the causes of action alleged herein in their schedules of assets as required by bankruptcy law although all but one of those claims had arisen prior to that time. The third cause of action asserted by Deffets arose on August 5, 1975, during the pendency of the Chapter XI Proceedings and prior to the confirmation of Deffets' Amended Consolidated Plan of Arrangement (the "Plan"). Deffets also failed to list any of these claims in their amended schedules, their statement of financial affairs, or the Plan. (Petree Affidavit, ¶¶2-4 and 6 and Exs. A, B, C and D)[2] Furthermore, the Bankruptcy Court never approved the abandonment of these claims. (Petree Affidavit, ¶5)

The commencement of the Chapter XI Proceedings automatically stayed all pending lawsuits, including a lawsuit filed by the Bank on or about December 31, 1974, in Chancery Court, Anderson County, Tennessee (the "Tennessee Suit") to foreclose the Bank's mortgage as reformed upon certain property owned by Deffet Rentals,

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[2]"Petree Affidavit, ¶ and Ex. " refer to the paragraphs of, or exhibits to, the Affidavit of Charles R. Petree, II, filed by the Bank in support of its Motion for Summary Judgment in the Court of Common Pleas for Cuyahoga County.

Inc. and Tara Hills, Ltd.[3] (Fowler Affidavit, ¶¶2 and 3 and Exs. A and B) On or about May 16, 1975, the Bank filed a complaint against Deffet Rentals, Inc. in its Chapter XI proceedings seeking relief from the automatic stay in order to prosecute the foreclosure action. On June 13, 1975, the Bankruptcy Court granted the Bank's petition and dissolved the stay.

Deffet Rentals, Inc. was served with a summons in the Tennessee Suit and received notice of the hearing on the Bank's Motion for Default Judgment in said matter. (Fowler Affidavit, ¶4) When Deffet Rentals, Inc. failed to answer, contest or otherwise defend said action, despite being informed of the Motion for Default Judgment on several occasions by the Bank's counsel, the Chancery Court granted the Bank's Motion. (Fowler Affidavit, ¶¶4 and 5 and Ex. D) Thereafter, on or about July 8, 1975, Deffet Rentals, Inc. filed a motion seeking to vacate the default judgment and alleging, as Deffets have in their third cause of action herein, that it was fraudulently induced to take no action in the foreclosure proceedings. (Fowler Affidavit, ¶6 and Ex. E) Deffet Rentals, Inc. failed to comply with Tennessee practice and never set a hearing date for the motion. (Fowler Affidavit, ¶7 and Ex. F) Consequently, the Tennessee court ruled the motion seeking to vacate had been waived and entered a final decree for the Bank. (Fowler Affidavit, ¶8 and Ex. G) No appeal was taken from that final decree.

On October 2, 1975, Deffets, *as debtors in possession*, filed an action against the Bank in Columbus, Ohio, in the United States District Court, Southern District of Ohio,

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[3]At the time of the foreclosure action, Deffet Rentals, Inc. was the sole general partner of Tara Hills, Ltd., an Ohio limited partnership. (Fowler Affidavit, Ex. A at ¶3) "Fowler Affidavit, ¶ and Ex. " refer to the paragraphs of, or exhibits to, the Affidavit of Sam. F. Fowler, Jr., filed by the Bank in support of its Motion for Summary Judgment.

Eastern Division, Case No. C-2-75-680, asserting essentially the same causes of action now alleged individually in this case. (*See* Petree Affidavit, Ex. F) Following the filing of a Motion to Dismiss the Columbus case for lack of jurisdiction, a Stipulation of Dismissal was filed on or about July 30, 1976. (Petree Affidavit, Ex. G)

On November 26, 1975, the Bankruptcy Court entered the Order confirming the Plan. (Petree Affidavit, Ex. D) The Plan governed the arrangements of all three of the Deffets' Chapter XI proceedings and generally provided for the satisfaction of creditors' claims, divided into three classes, over a four-year period without interest. Additionally, Class 3 creditors, those with claims in excess of Four Thousand Dollars, could opt for a lump sum payment in lieu of full payment over four years if sixty-five percent of those creditors agreed. (*See* Petree Affidavit, Ex. D at 2-6)

Finally, on or about December 16, 1976, after confirmation of the Plan, but before the final decrees were entered in the Chapter XI Proceedings, and despite never having scheduled their alleged claims against the Bank in those proceedings, Deffets filed this action on their own behalf rather than as debtors in possession on behalf of their creditors. Deffets have made no attempt to reopen the Chapter XI Proceedings.

REASONS FOR GRANTING THE WRIT

In the instant case, the Ohio courts have fashioned new federal bankruptcy law by permitting Deffets to bring this action for their own benefit notwithstanding the fact these claims were neither scheduled, administered, nor abandoned in Deffets' bankruptcy proceedings. In so doing, the Ohio courts' decision directly conflicts with decisions of this Court and federal appellate courts.

Furthermore, the decision below sanctions selective and random disclosure by the debtor of his assets in bank-

ruptcy proceedings, rather than the full and complete disclosure mandated by decisions of this Court. This encourages and rewards fraud and erodes the fiduciary duties of the debtor in possession.

Finally, the Ohio courts have refused to recognize the judgment of a Tennessee state court that collaterally estops Deffets from bringing their third cause of action herein, and this refusal violates the Full Faith and Credit Clause of the United States Constitution and contravenes decisions of this Court.

I. THE DECISION OF THE OHIO COURTS PERMITS FORMER DEBTORS TO PROSECUTE UNDISCLOSED CLAIMS FOR THEIR OWN BEHALF IN CONFLICT WITH DECISIONS OF THIS COURT AND FEDERAL APPELLATE COURTS.

A. Deffets Did Not Schedule The Causes Of Action They Are Seeking To Assert Herein In Their Bankruptcy Proceedings, As Required By Federal Law.

A clear objective of the federal bankruptcy law[4] is to assemble and distribute the debtor's assets for the benefit

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[4]The Bankruptcy Act, Ch. 541, 30 Stat. 544 (1898), as amended by the Chandler Act, Ch. 575, 52 Stat. 840 (1938), rather than the Bankruptcy Code, 11 U.S.C. Section 101-151326 (1978), is controlling in this case. Section 403(a) of the Act to establish a Uniform Law on the Subject of Bankruptcies of November 6, 1978, provided that bankruptcy actions commenced under the former Act would continue to be governed by the provisions of that former Act. Act of November 6, 1978, Pub. L. No. 95-598, § 403, 92 Stat. 2549, 2683 (1978). Although the Bankruptcy Code governs bankruptcy cases filed at the present time, the principles at issue in the present case are generally codified in the Bankruptcy Code and are therefore vital and relevant to pending and future bankruptcy cases; therefore, citations herein to bankruptcy statutes and rules will refer to the Bankruptcy Act and Bankruptcy Code and former and current bankruptcy rules.

of all its creditors. "The purpose of the Bankruptcy Law, passed pursuant to the power of Congress to establish a uniform system of bankruptcy throughout the United States, is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors." *Straton v. New*, 283 U.S. 318, 320-321 (1931). *Accord, Joint Industry Board of Electrical Industry v. United States*, 391 U.S. 224, 228 (1968).

Accordingly, to obtain the protection of the bankruptcy law, the debtor must make his property available for distribution to his creditors in the bankruptcy proceedings. This requires that the debtor disclose all of his property to the creditors. The bankruptcy law provides for this by placing upon the debtor the affirmative duty to list all of his assets in schedules filed with the bankruptcy court. 11 U.S.C. § 521(1); Ch. 575, § 7(a)(8), 52 Stat. 840, 847 (amended 1952 and repealed). Obviously, it would be impractical, if not uneconomical, to provide *actual* notice of all the debtor's assets to each creditor. The schedule of assets provides the fullest disclosure of the debtor's property practicable and is thus the most effective means of providing creditors with this information. *See In re Semel*, 411 F.2d 195, 197 (3d Cir. 1969), *cert. denied*, 396 U.S. 905 (1969).

Scheduling is vital to ensure that all creditors are aware of the property that may be available to satisfy their claims against the debtor. For this reason, the law presumes that one who seeks the benefits of bankruptcy law "will deal honestly and fairly with his creditors by furnishing a complete and accurate schedule of his assets." *In re Thomas*, 204 F.2d 788, 794 (7th Cir. 1953). Therefore, "A petitioner may not seek the benefits of the Bankruptcy Act and at the same time be allowed to refuse to furnish a complete and accurate schedule of his assets." *In re Semel*,

411 F.2d at 197. The schedule of assets provides creditors with the means of assessing the debtor's financial position and the merits of any proposed plan. *In re Braten Apparel Corp.*, 21 Bankr. 239, 262 (Bankr. S.D.N.Y. 1982), *aff'd*, 26 Bankr. 1009 (S.D.N.Y. 1983). Conversely, the failure to schedule an asset deprives creditors of the knowledge necessary to protect and enforce their rights against the debtor in bankruptcy proceedings.

By failing to schedule their alleged claims against the Bank, Deffets deprived creditors of information relevant to Deffets' financial position and the merits of the Plan. The fact that these claims are allegedly worth Eighty-Three Million Dollars exacerbates their omission from Deffets' schedules of assets. Nevertheless, the decision of the Ohio courts allows Deffets to prosecute these claims on their own behalf and for their own benefit despite this violation of the federal bankruptcy law.

Additionally, the Ohio courts have eroded the statutory requirement that debtors schedule *all* their property by permitting Deffets to have omitted assets from their schedules with impunity. Without scheduling, a creditor may be unaware of a potentially valuable asset, which may result in the asset not being administered by the bankruptcy court. The Ohio courts' decision thus undermines the bankruptcy court's ability to assemble and distribute assets to creditors and conflicts with the policy underlying federal bankruptcy law enunciated by this Court.

B. Deffets' Failure To Schedule Their Alleged Causes Of Action Against The Bank Precludes Them From Now Asserting These Claims For Their Individual Benefit.

A former debtor in bankruptcy proceedings has no standing to assert rights in an unscheduled and unadministered asset.[5] *E.g.*, *First National Bank v. Lasater*, 196 U.S. 115 (1905); *Stein v. United Artists Corp.*, 691 F.2d 885, 892-893 (9th Cir. 1982); *Scharmer v. Carrollton Manufacturing Co.*, 525 F.2d 95, 98-99 (6th Cir. 1975); *Tuffy v. Nichols*, 120 F.2d 906, 909 (2d Cir. 1941), *cert. denied*, 314 U.S. 660 (1941). *See* 11 U.S.C. § 554(d). This rule was originally established in the context of liquidation and

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[5]Title to all property enumerated in Section 70(a) of the Bankruptcy Act that was owned by Deffets vested in the debtors in possession upon the commencement of the Chapter XI Proceedings. *See* Ch. 575, § 70(a), 52 Stat. 840, 879-880 (amended 1952 and repealed); *Gochenour v. Cleveland Terminals Building Co.*, 118 F.2d 89, 93 (6th Cir. 1941). Deffets have conceded that all the causes of action alleged against the Bank vested in them as debtors in possession, with the exception of the third and fourth causes of action. (Deffets' Appellate Brief, at 19). Deffets' third cause of action is based upon alleged fraudulent conduct by the Bank and therefore vested in the debtors in possession. *See* OHIO REV. CODE ANN. § 2305.21; *Murphy v. Household Finance Corp.*, 560 F.2d 206, 208 (6th Cir. 1977); 4A Collier on Bankruptcy ¶ 70.28[6], at 412-412.1 (14th ed. 1978). Additionally, the fourth cause of action vested in the debtors in possession since that cause of action fails to allege additional damages attributable solely to any interference with Deffets' business relationships. *Cf. Davison Fuel & Dock Co. v. Pickands Mather & Co.*, 54 Ohio App. 2d 177, 182, 376 N.E.2d 965 (Hamilton Cty. 1977). Section 70(i) of the Bankruptcy Act provides that only property "dealt with" in the bankruptcy proceedings revests in the debtors. Ch. 575, § 70(i), 52 Stat. 840, 882 (repealed). Under the Bankruptcy Code, the debtor is still divested of title to its property because the debtor's property becomes property of the estate. 11 U.S.C. § 541(a).

Chapter X bankruptcy proceedings.[6] In *Lasater*, a former bankrupt attempted to enforce a claim for usury two months after receiving a discharge in bankruptcy and after the discharge of the trustee. "The bankrupt returned no assets to the trustee and did not tell him or the creditors about this claim for usury." 196 U.S. at 116. The bankrupt's failure to disclose the existence of the usury claim to the trustee meant the trustee could not have abandoned the asset.[7] Additionally, the failure to schedule the usury claim deprived creditors of notice of the claim: "If the claim was of value (as certainly this claim was according to the judgment below) it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property." 196 U.S. at 119. Consequently, this Court held that the failure to schedule the usury claim, which deprived creditors of knowledge of this valuable asset, prevented the bankrupt from asserting title to the usury claim. 196 U.S. at 119. *Accord*, *Scharmer v. Carrollton Manufacturing Co.*, 525 F.2d at 98; *Tuffy v. Nichols*, 120 F.2d at 909.

The rule pronounced by this Court in *Lasater* is particularly applicable to Chapter XI proceedings[8] when the

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[6]A liquidation proceeding is a proceeding in which certain assets are liquidated and debts may be discharged without involving the bankrupt's potential future earnings or income. A Chapter X bankruptcy proceeding is a reorganization proceeding generally for corporations with public debt or security holders whose rights would be adversely affected by the reorganization. *Securities and Exchange Commission v. American Trailer Rentals Co.*, 379 U.S. 594, 604-606 (1965).

[7]Upon abandonment of an asset, whether under the Bankruptcy Act or Bankruptcy Code, title to the asset revests in the debtor. 4 Collier on Bankruptcy ¶ 554.02[2], at 554-7 to 8 (15th ed. 1984).

[8]A Chapter XI proceeding is a summary proceeding that adjusts the debts of unsecured creditors. The formulation of a plan of arrangement under Chapter XI, unlike Chapter X, is largely in the hands of the debtor with a "bare minimum of independent control or supervision." *Securities and Exchange Commission v. American Trailer Rentals Co.*, 379 U.S. at 606.

debtor serves as debtor in possession, as in the instant case. *Stein v. United Artists Corp.*, 691 F.2d at 892.[9] The facts of *Stein* are strikingly similar to those herein. The plaintiff in *Stein* was the primary shareholder and officer of Century Cinema Circuit, Inc. ("Century"), an operator of motion picture theaters, who sued as an assignee of Century's antitrust claims, as well as in his individual capacity; his wife also joined in some of the claims. The complaint, in part, alleged that various motion picture exhibitors, distributors, and individual officers had conspired to drive plaintiff out of business, thereby violating federal antitrust laws. In 1976 following the alleged conspiracy, Century sought relief under Chapter XI of the Bankruptcy Act. Century, like Deffets herein, was a debtor in possession in those proceedings and did not list the antitrust claims in its schedule of assets. Stein filed his antitrust action in June 1979 after the estate was closed.

The court in *Stein* held the plaintiff lacked standing to assert the unscheduled antitrust claims since they were neither administered nor abandoned in the bankruptcy proceedings. 691 F.2d at 893. Unless an asset is administered, abandoned, or scheduled in bankruptcy proceedings, title to the asset does not revest in the debtor.[10]

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[9]"Courts and commentators have not considered how unlisted assets are to be pursued after the completion of Chapter XI rearrangements." 691 F.2d at 890. *Stein* was decided prior to the Court of Appeals' decision reversing the entry of summary judgment, but after the parties submitted their briefs to that court.

[10]This rule, derived from case law and Section 70(i) of the Bankruptcy Act, has been codified in Section 554(d) of the Bankruptcy Code under which "formally unabandoned and unadministered property that was not scheduled thus 'remains property of the estate'." 4 Collier on Bankruptcy ¶ 554.03, at 554-12 (15th ed. 1984).

Deffets admit they failed to schedule the alleged causes of action asserted against the Bank in the present case. The Ohio Court of Appeals, nonetheless, held that Deffets now have standing to assert these claims against the Bank on the basis of certain random mentions of these claims. There is no case that supports the Court of Appeals' conclusion that such mentions excuse Deffets' failure to list these claims in their schedules of assets.

Certainly the fact Deffets allegedly mentioned these claims before the Creditors' Committee does not constitute *actual* notice to all Deffets' creditors. Nor is this "mention" constructive notice to all creditors since the Creditors' Committee owes no fiduciary duty to all creditors and the claims of creditors serving on the Creditors' Committee may conflict with claims of other creditors.

Similarly, the reference to the alleged claims against the Bank in certain pleadings could not have provided all Deffets' creditors with *actual* notice of these claims.[11] At most, such pleadings may constitute some form of constructive notice, but not the type of notice sanctioned by, or

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[11]Deffets assert they provided ample notice of these claims by (1) alleging in paragraph four of their Answer to the Bank's Complaint for Relief from Stay that the Bank had breached an agreement, a rather oblique reference to say the least; (2) filing a complaint in the United States District Court in Columbus, Ohio alleging essentially the same causes of action alleged in the instant case, which case was dismissed by stipulation between the parties; and (3) filing the Complaint in the present case in the Court of Common Pleas for Cuyahoga County, Ohio (Cleveland). The notion that all creditors in proceedings pending in Columbus, Ohio were aware of a civil suit filed in a common pleas court in Cleveland is, speaking kindly, temerarious.

sufficient under, federal bankruptcy law. *See Tuffy v. Nichols*, 120 F.2d at 909.[12] Creditors should be able to rely upon the schedules filed by the debtor to ascertain the nature and value of all the debtor's property without having the burden of conducting their own investigation, since a debtor has the affirmative *duty to schedule* all his assets. *See* 11 U.S.C. § 521(1); Ch. 575, § 7(a)(8), 52 Stat. 840, 847 (amended 1952 and repealed).

In the present case, as in *Stein*, the unscheduled causes of action were neither abandoned nor administered in the Chapter XI Proceedings. Deffets have never alleged that the claims were abandoned, and the Bankruptcy Court did not approve their abandonment as required by law. *E.g., Stein v. United Artists Corp.*, 691 F.2d at 891; Bankruptcy Rule 6007; Bankruptcy Rule 11-55 (superseded). The Record is devoid of facts indicating these claims were administered by the Bankruptcy Court.[13] Notwithstanding any mention of the existence of certain of the alleged claims against the Bank at the hearing on the Bank's Complaint for Relief from Stay, the bankruptcy court never took any action to administer or supervise these claims.

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[12]In *Tuffy v. Nichols*, the Court of Appeals for the Second Circuit held that the publication of the bankrupt's inherited remainder interest, which was not scheduled as an asset, and the fact that the will devising the bankrupt's remainder interest was a matter of public record were not substitutes for *actual* notice or notice by *scheduling* to creditors. The bankrupt's failure to schedule the remainder interest therein precluded the bankrupt's heirs from asserting title to that asset.

[13]Deffets have asserted below that despite their failure to schedule the alleged claims against the Bank, the Plan is conclusive evidence that title to these claims revested in them, relying on Section 21(h) of the Bankruptcy Act and former Bankruptcy Rule 11-38(f), which provide that title revests in the debtor upon the confirmation of the plan. Deffets' argument is circular and patently absurd. Only property that was scheduled or administered and thus "dealt with," as provided in Section 70(i) of the Bankruptcy Act, revests upon confirmation of a plan of arrangement. *Stein v. United Artists Corp.*, 691 F.2d at 885; 14 Collier on Bankruptcy ¶ 11-38.07, at 11-38-30 to 31 (14th ed. 1976).

Consequently, upon dismissal of this case, the proper procedure for Deffets to follow would be to petition the Bankruptcy Court to reopen the Chapter XI Proceedings. *E.g., Stein v. United Artists Corp.*, 691 F.2d at 893; *Scharmer v. Carrollton Manufacturing Co.*, 525 F.2d at 98. *Cf.* 11 U.S.C. § 350(b); Bankruptcy Rule 515 (superseded). Once the applications to reopen the Chapter XI Proceedings are made, the Bankruptcy Court will be able to determine whether to reopen the proceedings and, if reopened, whether the alleged claims against the Bank should be administered for the benefit of Deffets' creditors. *Scharmer v. Carrollton Manufacturing Co.*, 525 F.2d at 98-99.

Lasater and *Stein*, among other federal court decisions, establish that title to an unscheduled cause of action that is neither abandoned nor administered does not revest in the debtor upon the termination of the bankruptcy proceedings. In those instances, the debtor accordingly lacks standing to assert the unscheduled causes of action. The Ohio courts, however, permitted Deffets to bring this action individually even though the claims against the Bank were not scheduled, abandoned, nor administered in the Chapter XI Proceedings. Therefore, the Ohio courts' decision conflicts with decisions of this Court and other federal courts interpreting federal law, as well as the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[14]

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[14]The law is well settled that state court decisions constitute state action for purposes of the Fourteenth Amendment to the United States Constitution. *Bouie v. Columbia*, 378 U.S. 347, 354-355 (1964). "The touchstone of due process is the protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). By permitting Deffets to assert the causes of action alleged against the Bank despite the fact they lack title thereto, the Ohio courts may arbitrarily deprive the Bank of its property contrary to the Due Process Clause of the Fourteenth Amendment.

II. THE DECISION OF THE OHIO COURTS ALLOWS FORMER DEBTORS TO ASSERT TITLE TO ASSETS WITHOUT MAKING THE FULL AND COMPLETE DISCLOSURE OF THOSE ASSETS IN THEIR BANKRUPTCY PROCEEDINGS AS REQUIRED BY DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

Full disclosure of all assets is essential to provide creditors and other interested parties with the information necessary to assess a debtor's financial position, their claims and rights against the debtor, and whether to accept the proposed plan. *See In re Cyr Brothers Meat Packing, Inc.*, 2 Bankr. 620, 624-625 (Bankr. D. Me. 1980). Because of this basic principle, both this Court and other federal courts have held that federal bankruptcy law mandates full and complete, not partial, disclosure by the debtor of all its assets. *American United Mutual Life Insurance Co. v. Avon Park*, 311 U.S. 138, 145-146 (1940), *reh. denied*, 311 U.S. 730; *In re New York Fluorescent Light Co.*, 44 F. Supp. 54, 58-59 (E.D.N.Y. 1942). *See In re Semel*, 411 F.2d at 196-197. Scheduling an asset is the fullest practical means of disclosure to all creditors and interested parties. *In re Semel*, 411 F.2d at 197.

Despite this requirement of full and complete disclosure, the Ohio courts have allowed Deffets to prosecute these claims based upon what the courts recognized were no more than a few haphazard mentions of the existence of these claims by Deffets. In none of the instances relied on by the Ohio courts was notice provided in a manner that would ensure *all* creditors were likely to receive the information as required by federal law.

The inadequacy under bankruptcy law of the type of mentions relied upon by the Ohio courts was made clear in *Cyr Brothers*. The facts of *Cyr Brothers* closely parallel those at bar. The debtor therein possessed causes of action

against several banks and other financially responsible parties, but there was no evidence that the claims were scheduled. 2 Bankr. at 621-625. These claims were, however, the subject matter of a pleading filed with the bankruptcy court: a request for authorization to compromise. Additionally, the Creditors' Committee was aware of these causes of action as evidenced by the fact that the bankruptcy court, after the hearing on confirmation, requested counsel for the Creditors' Committee to set forth a general description of the nature of the causes of action. Despite such notice, the court refused to confirm the plan of arrangement for lack of full and complete disclosure to creditors:

> On the basis of the limited information available to the court it is not possible to evaluate the merits of these causes of action. It would have been utterly impossible for individual creditors to have done so before submitting their acceptance, because *the information needed for that purpose has never been disclosed to creditors*. 2 Bankr. at 625 (emphasis added).

See also Tuffy v. Nichols, 120 F.2d at 909 (The publication of a remainder interest and will devising that remainder interest is not a sufficient disclosure to creditors for purposes of bankruptcy law).

The alleged mentions by Deffets were, at most, *partial* disclosures of the alleged claims against the Bank and a clearly inadequate substitute for full and complete disclosure, whether by actual notice or scheduling. The Ohio courts' decision thus conflicts with the policy enunciated by this Court and other federal courts that disclosures in bankruptcy proceedings must be *full* and *complete*.

Furthermore, the decision of the Ohio courts establishes a dangerous precedent. The opportunity for fraud is enhanced when the debtor is not required to make a full and complete disclosure of all his assets; a debtor may

strategically select to whom, when, and how to disclose an asset, as well as control the content of the disclosure, thereby limiting the impact of the disclosure. A valuable asset may thus escape the attention of interested creditors when the debtor is permitted to selectively and partially disclose his property.

Full and complete disclosure is particularly critical in instances such as the present case when the debtor serves as debtor in possession. The debtor in possession is the same physical person as the debtor, but owes fiduciary duties to the bankruptcy court and to the debtors' creditors. *Gochenour v. Cleveland Terminals Building Co.*, 118 F.2d 89, 93 (6th Cir. 1941). *See N.L.R.B. v. Bildisco and Bildisco*, 104 S.Ct. 1188 (1984). The opportunity for self-dealing is enhanced since the debtor and debtor in possession are the same physical person, and the debtor in possession has a greater interest than a trustee in preserving whatever of value he can for the debtor. Who can say how fairly a debtor in possession might choose to characterize an unscheduled cause of action? The debtor in possession has every incentive to denigrate its value and later reap the harvest of the claim as the debtor, its alter ego. Consequently, "Chapter XI proceedings, in which the debtor remains in possession, present a stronger case for preventing bankrupts from asserting title to unlisted assets than in Chapter X cases such as *Lasater* and *Scharmer*." *Stein v. United Artists Corp.*, 691 F.2d at 892.

The standard adopted here by the Ohio courts for bankruptcy disclosures would encourage and reward fraud and erode the fiduciary duties of the debtor in possession. Whether or not Deffets intended to defraud their creditors, the deleterious effect of the Ohio courts' decision is not

diminished.[15] Other debtors will certainly see this as a means of evading the law for their personal gain. As the court stated in *Stein*:

> If a debtor in possession were permitted to omit claims in bankruptcy and later assert title to them, there might be an inducement to do so, to the prejudice of creditors' interests. Such a rule would undermine the fiduciary status of the debtor in possession. Whether or not the failure to list the asset in the case before us was intentional, the opportunity for concealment must be considered in formulating the proper general rule. 691 F.2d at 892.

Accord, In re Seats, 537 F.2d 1176, 1178 (4th Cir. 1976).

The Ohio courts failed to consider the "opportunity for concealment" when they permitted Deffets to bring this case despite their failure to make a full and complete disclosure of all their property. Ample incentive for the unscrupulous debtor to conceal assets from creditors in bankruptcy proceedings already exists, and a decision such as that of the Ohio courts that sanctions selective and random disclosure of the debtor's property facilitates this type of fraud. In view of the growing number of bankruptcy cases, the importance of this Court clearly proclaiming a full disclosure requirement is manifest.

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[15]It should be noted that Deffets recognized their duties to prosecute these claims on behalf of their creditors when they earlier filed the action against the Bank in Columbus as *debtors in possession* asserting essentially the same causes of action alleged individually herein. This case was dismissed by stipulation of the parties.

III. THE OHIO COURTS VIOLATED THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION BY FAILING TO GIVE COLLATERAL ESTOPPEL EFFECT TO THE JUDGMENT OF A SISTER STATE COURT.

The doctrine of collateral estoppel provides that when an issue of fact is finally adjudicated by a court,[16] the parties to the action are barred from relitigating the same issue in any subsequent lawsuit. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). This doctrine reaches beyond the nominal parties to a suit and includes those whose interests were so involved in the litigation that they were real parties although not named to the suit. For example, individuals who are the principal shareholders of a corporation are bound by a judgment against that corporation since their proprietary rights are affected by the outcome of the litigation. *United States v. Webber*, 396 F.2d 381, 386-388 (3d Cir. 1968); *Broderick & Bascom Rope Co. v. Manoff*, 41 F.2d 353 (6th Cir. 1930). *See also Montana v. United States*, 440 U.S. at 154.

Deffet Rentals, Inc. was the named party in the Tennessee Suit, but George and Rose Deffet were parties to that litigation for collateral estoppel purposes. George and Rose Deffet were shareholders of, and guarantors of loans made to, Deffet Rentals, Inc. (Complaint, ¶¶3 and 11) George and Rose Deffet were therefore directly interested in the subject matter and outcome of the Tennessee foreclosure action in view of their pecuniary interest, and they possessed the opportunity to control and conduct the defense of Deffet Rentals, Inc. therein. Consequently, they were real parties to the Tennessee Suit and, along with Deffet Rentals, Inc., are thus subject to the application of the doctrine of collateral estoppel.

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[16]Deffets have never contested the jurisdiction of the Tennessee Chancery Court.

The issue raised by Deffets in their third cause of action herein was decided adversely to them by the Tennessee Chancery Court. Subsequent to the reformation of the mortgage deed on Tara Hills and the foreclosure of the same in the Tennessee Suit, Deffets filed a motion seeking to vacate the judgment alleging, as they have in their third cause of action herein, that the Bank fraudulently induced them not to defend that case. Deffets failed, however, to set their motion for a hearing, and the Tennessee court, when apprised of the motion at the time the Final Decree was entered, ruled the motion had been waived and entered a final, appealable order. Deffets never pursued an appeal in that case. Therefore, under Tennessee law, the Tennessee court's judgment collaterally estops Deffets from bringing this claim against the Bank in the present case.[17]

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[17]In *Lawhorn v. Wellford*, 179 Tenn. 625, 168 S.W.2d 790, 792 (1943), defendant contested plaintiff's authority to sue as agent of a bank serving as executor in an action to enforce a prior judgment against defendant. The Supreme Court of Tennessee held that defendant was estopped to assert this claim because the issue was a matter set forth in the complaint in the prior case and waived when defendant failed to answer. *See generally Shelley v. Gipson*, 400 S.W.2d 709, 714 (Tenn. 1966).

Nevertheless, the Ohio courts have permitted Deffets to relitigate this issue as their third cause of action against the Bank and thus failed to give the judgment of the Tennessee Chancery Court collateral estoppel effect. Under the Full Faith and Credit Clause of the United States Constitution, a valid and final judgment of a state court must be respected by courts in sister states. U.S. Const. art. IV, § 1; *Nevada v. Hall*, 440 U.S. 410, 421 (1979), *reh. denied*, 441 U.S. 917 (1979); *Morris v. Jones*, 329 U.S. 545, 547 (1947), *reh. denied*, 330 U.S. 854 (1947); *Roche v. McDonald*, 275 U.S. 449, 451-452 (1928). In refusing to respect the judgment of the Tennessee court, the Ohio courts have acted contrary to decisions of this Court and the United States Constitution.[18]

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[18]The purpose of the Full Faith and Credit Clause is to "[A]lter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of others, and to make them integral parts of a single nation." *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935).

CONCLUSION

By permitting Deffets to bring this action despite the fact these claims were neither scheduled, administered, nor abandoned in Deffets' Chapter XI proceedings, the Ohio courts have forged new federal law in direct conflict with decisions of this Court and federal appellate courts as well as the United States Constitution. Furthermore, the Ohio courts' decision undermines the purposes of federal bankruptcy law enunciated by this Court, encourages the concealment of assets, and violates the Full Faith and Credit Clause of the United States Constitution. In view of the foregoing, the Bank respectfully requests that its Petition be granted and the decision of the Ohio courts be summarily reversed in accordance with S. Ct. R. 23.1.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	*1984 TERM*
City of Columbus.	*To wit: April 4, 1984*
DEFFET RENTAL, INC., *et al.*, *Appellees,* vs. UNION COMMERCE BANK, *Appellant.*	**No. 84-219** **APPEAL FROM THE COURT OF APPEALS** **for Cuyahoga County**

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____, 19____

_____ *Clerk*

_____ *Deputy*

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	*1984 TERM*
City of Columbus.	*To wit: April 4, 1984*

DEFFET RENTAL, INC., *et al.*, *Appellees,* vs. UNION COMMERCE BANK, *Appellant.*	**No. 84-219 MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for Cuyahoga County TO CERTIFY ITS RECORD**

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Baker & Hostetler

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
This ____ day of _____, 19____

_____ *Clerk*

_____ *Deputy*

APPENDIX B

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA
No. 44706

DEFFET RENTALS, INC., *et al.*
Plaintiff-Appellants
vs
UNION COMMERCE BANK
Defendant-Appellee

JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT OF DECISION: JULY 28, 1983

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court Case No. 964,131

JUDGMENT: Reversed and remanded

DATE OF JOURNALIZATION: DEC. 12, 1983

APPEARANCES:

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

Deffet Rentals, Inc.,
et al.

Appellants — Court of Appeals No. 44706

vs. — Lower Court No. C.P. 964131

UNION COMMERCE BANK — Motion No. 71489

Appellee

Date: Dec. 12, 1983

JOURNAL ENTRY

Motion by appellee for reconsideration is denied. Exc.

RECEIVED FOR FILING
DEC. 12, 1983
GERALD E. FUERST,
CLERK OF COURTS

NAHRA, J.,
CORRIGAN, P.J.,
McMANAMON, J. CONCUR.

JOSEPH J. NAHRA
JUDGE
JOSEPH J. NAHRA

APPENDIX C

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA
No. 44706

DEFFET RENTALS, INC., *et al.*
Plaintiff-Appellants
vs.
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Defendant-Appellee

JOURNAL ENTRY and OPINION

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DATE OF JOURNALIZATION:

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NAHRA, J.:

Appellant Deffet Rentals, Inc. is a real estate company of which the other appellants, George and Rose Deffet, are principals. For a number of years, appellants enjoyed an ongoing business relationship with appellee Union Commerce Bank. Included in these transactions were a series of construction loans, the breach of which serves as the basis of the claims appellants alleged in their complaint. The prayer for recovery seeks damages for breach of contract, illegal foreclosure, severe damage to business and personal reputation and credit standing, intentional, willful and malicious interference with business relationships, unjust enrichment, fraud, wrongful seizure of property, and failure to assume claims and liabilities. Punitive damages and attorneys' fees are also requested.

On April 22, 1975, subsequent to the alleged breach of the construction contracts by appellee, Deffet filed for reorganization under Chapter XI of the Bankruptcy Act. On October 2, 1975, while the bankruptcy proceedings were still pending, Deffet filed suit in Federal District Court in Columbus alleging essentially the same causes of action brought here. Following a motion to dismiss for lack of jurisdiction, a stipulation of dismissal was filed in Federal Court on July 30, 1976. On November 26, 1975, the Bankruptcy Court entered an Order Confirming Amended Consolidated Plan of Arrangement, which provided a plan for payment of creditors and provided further that:

> "Upon confirmation, title to Debtor's property shall be revested in Debtor and possession of the same shall be returned to Debtor."

This action was filed on December 16, 1976. On February 9, 1979, a final decree was entered in the Chapter XI cases. Defendant Union Commerce Bank filed for and was granted summary judgment below on the grounds that the Deffets did not have standing to sue, since they did not list

the claims involved on their Statement of Affairs or on their Schedule of Assets in the bankruptcy proceeding. From the granting of summary judgment, the Deffets appeal.

Appellants raise four assignments of error[1] which cover the same ground and will be treated together. Appellants claim the court erred in granting summary judgment to the defendant because the claims in question were disclosed by the Deffets and revested in them following the arrangement in bankruptcy.

The general rule is that a debtor who has not disclosed an asset in bankruptcy cannot thereafter assert rights in the asset. *Buckingham v. Buckingham* (1880), 36 Ohio St. 68; *First National Bank v. Lasater* (1905), 196 U.S. 115. Both of these cases involved circumstances where there was no disclosure of any kind and the courts held the bankrupt could not sue. However, both cases indicate that disclosure can be made otherwise than in the schedules and they rely heavily on the fact there was no disclosure of any kind. Also, the *Lasater* court spoke of a withholding of knowledge of the claims from the trustee. In *Buckingham* the court said at p. 77:

> "The schedules in the bankruptcy proceeding contained no reference to the claim sued on, nor was it mentioned or disclosed in the examination of the bankrupt; nor does it appear that the assignee was otherwise

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[1] The following are the assignments of error:

"I. UNION COMMERCE BANK IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE GENUINE ISSUES AS TO MATERIAL FACTS EXIST.

"II. UNION COMMERCE BANK IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

"III. THE JUDGMENT IS NOT SUSTAINED BY THE EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"IV. THE JUDGMENT IS CONTRARY TO LAW."

informed, or had notice of the nature or extent of the claim."

In *Lasater* the court said at p. 119:

"But that doctrine can have no application when the trustee is ignorant of the existence of the property, and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts, and still assert title to the property."

The language of *Buckingham* and *Lasater* is clear. "Mentioned or disclosed," "otherwise informed," "trustee is ignorant," and "withholding knowledge of its existence" are all phrases that suggest that the fact of notification, not the method, is what is central. Here, Deffet provided abundant proof of notification and of lack of withholding of knowledge. Deffet has shown both oral notice to court and creditors, and written notice by way of related court proceedings. In addition, they filed suit on the claims in Federal District Court and in Common Pleas Court while the bankruptcy was pending. Moreover, other documentary evidence is available that would bear on the issue of notice: On May 16, 1975, U.C.B. filed for relief from stays relating to its property imposed by bankruptcy court and on June 10, 1975, in Deffet's answer to that complaint, it referred to its claims against U.C.B. Further, affidavits demonstrate that notification was given and the creditors committee told

of the causes of action by its attorney. The facts of this case demonstrate no effort at concealment: rather, except for lack of scheduling, it appears that a substantial effort was made to inform and the nature and extent of the claims fully set forth in the two suits filed.

To hold that Deffet may be allowed to prove its claim is not to allow it an unfair windfall, as appellee seems to argue. Any creditor may reopen the bankruptcy proceedings in Federal Court to administer assets that should have been, but were not, scheduled. *Tuffy v. Nichols*, 120 F. 2d 906 (1941); *Re Thomas*, 204 F. 2d 788 (1953); *Crook v. Prudential Ins. Co.*, 34 F. Supp. 239 (1940). This is allowed under current statutory law, in the form 11 U.S.C. § 350(b) and under the old 11 U.S.C. § 11(a)(8). Bankruptcy Court has been considered an equity court, and thus the period for considering the reopening of a case is determined by equitable principles. Deffet could thus have to withstand claims by creditors in Federal Court to retain damages, if any, won below on remand.

Reversed and remanded.

This cause is reversed and remanded to the Common Pleas Court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant(s) recover of said appellee(s) their costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

RECEIVED FOR FILING
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CORRIGAN, P.J.,
McMANAMON, J., CONCUR.
Ann McManamon, Judge of the
Common Pleas Court of
Cuyahoga County,
Sitting by Assignment

JOSEPH J. NAHRA
JUDGE
JOSEPH J. NAHRA

For plaintiff-appellants: Harold E. Wonnell, 140 East Town St., Suite 1260, Columbus, Ohio 43215 and Raymond P. Cunningham, 22 East Gay Street, Columbus, Ohio 43215

For defendant-appellee: H. Stephen Madsen

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX D

PROCESSED BY
NOV. 10, 1981

CASE NO: 964131 ASSNG. JUDGE James Sweeney
OTHER JUDGE
Deffet Rentals Inc. VS Union Commerce Bank

CIVIL CASE STATUS FORM

MOTION

DESCRIPTION

☐ PLTF. ☑ GRT'D. ☑ DEFT. ☐ O. R. ☐ COURT ☐ H & S

Motion for Summary Judgment

DATE 10/27/81

SCHEDULE

☐ SCHEDULE ☐ RE-SCHEDULE
☐ JURY TRIAL DATE / /
☐ COURT TRIAL
☐ PRETRIAL TIME _____
☐ HEARING

REF

☐ 40 ARBITRATION
☐ 20 REFEREE

JE

☐ SUPPLEMENTAL
☐ ATT'Y TO SUBMIT

CASE

☐ 02 RE-ASSIGNED
☐ 04 REINSTATED

DISPOSITION

☐ 81 JURY TRIAL ☑ 89 DIS. W/PREJ.
☐ 82 ARB FIN DECREE ☐ 91 DEFAULT-COGNOVITS
☐ 83 COURT TRIAL ☐ 93 TRANSF. TO COURT
☐ 85 PRETRIAL ☐ 95 TRANSF. TO JUDGE
☐ 87 DIS. W/O PREJ.

☐ PARTIAL ☑ FINAL (F) ☑ POST CARD

JOURNAL

DATE 11-9-81 (NUNC PRO TUNC ENTRY AS OF AND FOR / /)

Deft, Union Commerce Bank's motion for summary judgment is well taken and is hereby granted. The complaint is dismissed at plaintiff's cost.

JAMES J. SWEENEY
JUDGE

COURT REPORTER
NAME _____
DAYS _____

CLERK OF COURTS
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APPENDIX E

United States Code, Title 11

§ 350. Closing and reopening cases

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) A[1] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

Pub. L. No. 95-598, § 350, 92 Stat. 2549, 2569 (Nov. 6, 1978, effective Oct. 1, 1979).

---

[1] The word "A" reads "a" in original.

APPENDIX F

United States Code, Title 11

§ 521. Debtor's duties

The debtor shall—

(l) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, and a statement of the debtor's financial affairs;

(2) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(3) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate; and

(4) appear at the hearing required under section 524(d) of this title.

Pub. L. No. 95-598, § 521, 92 Stat. 2549, 2586 (Nov. 6, 1978, effective Oct. 1, 1979).

APPENDIX G

United States Code, Title 11

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(l) Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) An interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date —

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

Pub. L. No. 95-598, § 541(a), 92 Stat. 2549, 2594 (Nov. 6, 1978, effective Oct. 1, 1979).

APPENDIX H

United States Code, Title 11

§ 554. Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

(c) Unless the court orders otherwise, any property that is scheduled under section 521(1) of this title and that is not administered before a case is closed under section 350 of this title is deemed abandoned.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under subsection[2] (a) or (b) of this section and that is not administered in the case remains property of the estate.

Pub. L. No. 95-598, § 554, 92 Stat. 2549, 2603 (Nov. 6, 1978, effective Oct. 1, 1979).

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[2]The word "subsection" reads "section" in original.

APPENDIX I

United States Code, Title 11

§ 25. Duties of Bankrupts. — (a) The bankrupt shall . . . (8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their residence or places of business, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated or disputed; and a claim for such exemptions as he may be entitled to; all in triplicate, one copy for the clerk, one for the referee, and one for the trustee: *Provided, however*, That the court may for cause shown grant further time or the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses.

Ch. 575, § 7(a)(8), 52 Stat. 840, 847 (repealed 1978, effective Oct. 1, 1979).

* * *

AMENDMENTS

Ch. 579, § 4, 66 Stat. 420, 422 (July 7, 1952), inserted "of places of business" and "however"in subsection (a)(8) of this section.

* * *

APPENDIX J

United States Code, Title 11

§ 44. Evidence. — . . . (h) A certified copy of an arrangement or wage-earner plan and of the order confirming it shall constitute evidence of the revesting in the debtor of title to the property dealt with by the arrangement or wage-earner plan, or of the vesting of title to such property in such other person as may be provided by the arrangement or wage-earner plan, and if recorded shall impart the same notice that an instrument of transfer from the trustee to the debtor or to such person if recorded would impart.

Ch. 575, § 21(h), 52 Stat. 840, 853 (repealed 1978, effective Oct. 1, 1979).

APPENDIX K

United States Code, Title 11

§ 110. Title to property. — (a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act [this title], except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: Provided, That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligency; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: Provided, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of

a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: And provided further, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representative, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act [this title], be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bank-

rupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy. All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

Ch. 575, § 70(a), 52 Stat. 840, 879-880 (repealed 1978, effective Oct. 1, 1979).

* * *

AMENDMENTS

Ch. 579, § 23(a), 66 Stat. 420, 429-430 (July 7, 1952), substituted "initiating a proceeding under this Act" for "in bankruptcy or of the original petition proposing an arrangement or plan under this Act" and inserted "of the following kinds of property wherever located" in the introductory clause of subsection (a); designated the second, third, and fourth sentences to be the second, third, and fourth paragraphs of subsection (a) and inserted "wherever located, except insofar as it is property which is held to be exempt" in the second and third paragraphs of subsection (a).

* * *

APPENDIX L

United States Code, Title 11

§ 110. Title to property. — . . . (i) Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrangement or plan, or in the order confirming the arrangement or plan, the title to the property dealt with shall revest in the bankrupt or debtor, or vest in such other person as may be provided by the arrangement or plan or in the order confirming the arrangement or plan.

Ch. 575, § 70(i), 52 Stat. 840, 882 (repealed 1978, effective Oct. 1, 1979).

APPENDIX M

Act of Nov. 6, 1978, Pub. L. No. 95-598, § 403, 92 Stat. 2549, 2683 (1978).

SEC. 403. (a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

(b) Notwithstanding subsection (a) of this section, sections 1165, 1167, 1168, 1169, and 1171 of title 11 of the United States Code, as enacted by section 101 of this Act, apply to cases pending under section 77 of the Bankruptcy Act (11 U.S.C. 205) on the date of enactment of this Act in which the trustee has not filed a plan of reorganization.

(c) The repeal made by section 401(a) of this Act does not affect any right of a referee in bankruptcy, United States bankruptcy judge, or survivor of a referee in bankruptcy or United States bankruptcy judge to receive any annuity or other payment under the civil service retirement laws.

(d) The amendments made by section 314 of this Act do not affect the application of chapter 9, chapter 96, section 2516, section 3057, or section 3284 of title 18 of the United States Code to any act of any person—

(1) committed before October 1, 1979; or

(2) committed after October 1, 1979, in connection with a case commenced before such date.

(e) Notwithstanding subsection (a) of this section, a fee may not be charged under section 40c(2)(b) of the Bankruptcy Act in a case in which the plan is confirmed after September 30, 1978, to the extent that such fee exceeds $100,000.

Act of Nov. 6, 1978, Pub. L. No. 95-598, 1978 U.S. CODE CONG. & AD. NEWS (92 Stat.) 2683.

APPENDIX N

Ohio Revised Code, Title 23

§ 2305.21 Survival of actions. In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

OHIO REV. CODE ANN. § 2305.21 (1981).

APPENDIX O

Bankruptcy Rules

Rule 6007. Abandonment or Disposition of Property

(a) Notice of proposed abandonment or disposition; objections. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to all creditors, indenture trustees and committees appointed or elected pursuant to the Code. An objective may be filed and served by a party in interest within 15 days of the mailing of the notice, or within the time fixed by the court.

(b) Motion by party in interest. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.

(c) Hearing. If a timely objection is made as prescribed by subdivision (a) of this rule, or if a motion is made as prescribed by subdivision (b), the court shall set a hearing on notice to the persons as the court may direct.

Bankruptcy Rule 6007 (1983).

APPENDIX P

Bankruptcy Rules

Rule 515. Reopening Cases

A case may be reopened on application by the bankrupt, or other person to administer assets, to accord relief to the bankrupt, or for other good cause. The application shall be filed with the clerk of the district court having custody of the papers in the case. The case shall be referred forthwith for action on the application and for further proceedings therein.

This rule authorizes reopening of closed bankruptcy cases in a purposely broadened conferral of equitable jurisdiction to cover situations typically arising from a bankruptcy.

Bankruptcy Rule 515 (superseded).

APPENDIX Q

Bankruptcy Rules

Rule 11-38. Deposit; Confirmation of Plan; Evidence of Title

. . . .

(f) *Evidence of Title*. A certified copy of the plan and of the order confirming the plan shall constitute conclusive evidence of the revesting of title to all property in the debtor or the vesting of title in such other person as may be provided in the plan or in the order confirming the plan.

Bankruptcy Rule 11-38 (superseded).

APPENDIX R

Bankruptcy Rules

Rule 11-55. Abandonment of Property

After hearing on such notice as the court may direct and on approval by the court the trustee, receiver, or debtor in possession may abandon any property.

Bankruptcy Rule 11-55 (superseded).

Office - Supreme Court, U.S.
FILED
JUL 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2153

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNION COMMERCE BANK,
Petitioner,

v.

DEFFET RENTALS, INC.,
GEORGE DEFFET AND ROSE DEFFET,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Ohio and the Court of Appeals for Cuyahoga County, Eighth District Court of Appeals, erred in reversing the trial court's granting of a motion for summary judgment and depriving plaintiffs-appellees of their day in Court.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

The within petition is bottomed upon two misconceptions with respect to the rulings of the Ohio Courts. The first is a misinterpretation of 11 U.S.C. § 110i (now repealed), while the second raises the specter of Full Faith and Credit which is in no way germane to the issues in this dispute. At the same time, the petitioner seeks delay against the day of reckoning; a trial on the merits.

The statute which controlled the revesting of title to property in the Deffets was 11 U.S.C. § 110i (now repealed), which provided in pertinent part:

> "Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrangement or plan, or in the order confirming the plan, the title to the property *dealt with* shall revest in the bankrupt or debtor. . . ." (Emphasis added.)

Petitioner confuses the language of 11 U.S.C. § 110i ". . . dealt with . . ." with "scheduled" in Chapter X bankruptcy proceedings or seeks to mislead in that direction. The Court of Appeals was not misled nor was the Ohio Supreme Court. In its decision, the Court of Appeals dealt with the major authority, *First National Bank* v. *Lasater* (1905), 196 U.S. 115, cited by petitioner for the proposition now urged. After setting forth the general rule that a debtor who has not disclosed an asset in bankruptcy cannot thereafter assert rights in the asset and citing *Buckingham* v. *Buckingham* (1880), 36 Ohio St. 68, the Court succinctly states:

> "The language of *Buckingham* and *Lasater* is clear. "Mentioned or disclosed," "otherwise informed," "trustee is ignorant," and "withholding knowledge of its existence" are all phrases that suggest that the fact of notification, not the method, is what is central. Here, Deffet provided abundant proof of notification and of lack of withholding of knowledge. Deffet has shown both oral notice to court and creditors, and written notice by way of related court proceedings. In addition, they filed suit on the claims in Federal District Court and in Common Pleas Court while the bankruptcy was pending. Moreover, other documentary evidence is available that would bear on the issue of notice: . . . "

Questions one and two presented by petitioner fall.

Petitioner urges a violation of the Full Faith and Credit Clause as well as the doctrine of collateral estoppel. Neither

are pertinent to the facts of this case. The Deffets seek redress for a fraud committed by petitioner while the bankruptcy proceedings were pending in Ohio. This matter was before the Court of Appeals on the issue of summary judgment, and it is evident, that even upon reconsideration, the Court did not find collateral estoppel was established, but rather there is an issue of fact as to a fraud in Ohio without regard to a judgment of a sister state.

CONCLUSION

The Ohio Courts refused summary judgment since the claims were "dealt with" and there was no violation of the Full Faith and Credit Clause. It is respectfully submitted that there is no viable ground for the sought after Petition and it should be denied.

Respectfully submitted,

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Counsel for Respondents